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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

FITZGERALD MILLS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Argument

One would assume from the Solicitor General's detailed statement of the evidence on which the Labor Board relied that the Board's Decision and Order, not the decision of the Court below, is in issue here. Furthermore, it is, to say the least, startling, in a case presenting the question whether the Court of Appeals, after rejecting the principal findings on which the Labor Board relied, properly substituted new and different findings of its own, to find the Solicitor General including in his Statement to this Court "facts" that neither the Board nor the Court found[1] and "facts" that the Court below expressly rejected.[2]

Aside from this, the Solicitor General's Brief, in attempting to establish that the Court, while rejecting much

1. See Appendix A, *infra*
2. See Appendix B, *infra*

of the evidence on which the Board relied, found there was still enough evidence to sustain each of the Board's six subsidiary findings, takes great liberties with both the Board's findings and the Court's in an effort to make them seem to harmonize.

1. The Court, in fact, found that there was "substantial evidence" supporting *only one* of the Board's subsidiary findings, namely, that the Company delayed in supplying two, not four, items of information (one of the two items, job descriptions, was non-existent). (Pet. 25-26).

We quote below the Solicitor General's summaries of the Board's remaining "subsidiary findings" with our comments on the summaries.

2. The Petitioner "adopted an intransigent attitude at the bargaining table." (S. G. Br. p. 16). This summary is grossly misleading.

The Board itself headed this subsidiary finding, "*The nature of Respondent's counterproposal* and its adamant refusal to enter into a contract with the Union *except on its own terms*." (Emphasis supplied.) The Board then said the counterproposal was "predictably unacceptable." (Pet. 49). The Court held that the counterproposal was *not* "predictably unacceptable" and that "there was bargaining." (Pet. 26, 28). It substituted for the Board's finding one of its own, that the Company's "uncompromising attitude" in adhering to a *reasonable* counterproposal was evidence of bad faith. (Pet. 28).

3. The Petitioner "gave its negotiators only limited authority." (S. G. Br. p. 16). What the Board actually found was that the Petitioner limited the authority of its negotiators "to accept only the Respondent's (predictably unacceptable) proposed contract." (Pet. 50). The Court substituted for this finding one that the Petitioner's negotiators' having to refer some proposals to their principals (although "prior contracts had been negotiated on this kind of basis") created "inherent possibilities of delay"—but neither the Trial Examiner, the Board nor the Court found that this caused any actual delay. (Pet. 29-30).

4. The Petitioner "took unilateral action." (S. G. Br. p. 16). The Board found that the Petitioner granted wage increases to a fork-lift driver and loom-fixers without bargaining. (Pet. 53). The Court dismissed these findings as trivialities. (Pet. 30). The Board also found that a general wage increase that the Petitioner granted on May 9, 1959, was unlawful because no impasse had been reached. (Pet. 53). The Court held, without qualification, that "an impasse was reached on May 7." (Pet. 23).

The Solicitor General argues that the impasse that the Court flatly found existed was not a "genuine" impasse because the Petitioner had not bargained in good faith and that therefore the wage increase was not protected. (S. G. Br. p. 18). He then cites this wage increase as evidence of bad-faith bargaining. The Court below was guilty of no such circular reasoning. It substituted for the findings of the Board that it rejected, one of its own, contrary to *N.L.R.B.* v. *Katz*, 369 U. S. 736 (1962), that even in the presence of an impasse, the wage increase was unlawful (Pet. 31).

5. The Petitioner "posted notices which were designed to undermine the Union." (S. G. Br. p. 16). The Board held that three notices to employees that the Petitioner published impressed the employees "not only that the Respondent alone was entitled to credit for the increase, but that Respondent intended to offer the Union no more than the Respondent had already unilaterally determined to grant, without reference to the collective bargaining process." (Pet. 54).

The Court held two of the three notices were "not material." (Pet. 31). It condemned the third, not because it showed a disregard for the bargaining process, but because it placed on the Union "the onus of delay in making effective the proposed wage increase." (Pet. 31). The unlawfulness of such an alleged effort was never litigated before the Board or the Court.

6. The Petitioner "made clear through the statements of General Manager Clark that it had no intention of reach-

ing agreement with the Union." (S. G. Br. p. 16). The Court properly ignored this finding as evidence of a refusal to bargain.

Conclusion.

Thus, of six subsidiary findings, the Court rejected much of the evidence as to one (dilatory tactics), and ignored a second (Clark's statements). It rejected the remainder of the Board's subsidiary findings, and proceeded to make other and different findings of its own as to (i) the nature of the Petitioner's offer and its bargaining technique, (ii) the authority of the Petitioner's bargainers, (iii) the Petitioner's "unilateral action," and (iv) the notices to employees. Petitioner has had no opportunity to litigate these new basic issues. As well as the statute, simple justice demands that it have that opportunity.

This Court ought not to assume that the Board would still find a violation of Section 8(a)(5) solely on the basis of the "dilatory tactics" on which the Court upheld the Board only in minor part, or that the Board would concur with the Court on the Court's own "subsidiary findings" that, so far, have not been argued before the Board or the courts.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

Neither the Board nor the Court made any of the following "findings of fact" as claimed in the Brief of the Solicitor General at the pages indicated:

p. 4: [The Company] "told the Union to make its own computation of their hourly earnings."

p. 5: "On March 17, receiving no reply, the Union, by telegram, again asked for a conference date."

p. 7: "Clark pointed out that the Company's wage proposal was not an across-the-board increase but was based on incentive earnings."

p. 7: "Botelho . . . indicated Union acceptance of at least six or seven of the 19 provisions of the Company proposal" [at the April 10th meeting].

p. 9: "The Union was told that its 'counter proposals' would have to be submitted to company 'higher ups' for any modification."

p. 10: "Botelho . . . was told Horblit was not available for discussion."

p. 12: "When asked whether he contemplated 'doniking up' the workload, Clark admitted 'he planned to take three jobs and make two out of them.'"

p. 12: "The work assignments and wages of loomfixers had been discussed at the bargaining meetings prior to the strike, but no agreement had been reached." [This is true and the Trial Examiner so found; but the Board *erroneously* found: "Respondent changed the wage rate and workload of loomfixers without consulting the Union." (J. A. 738).]

p. 13: "On Monday, July 6, Powell notified Botelho that the Company . . . would not yield from its original contract offer."

p. 14: "Botelho refused to accept this proposal [regarding replaced strikers] stating he would not 'bargain a working man's rights away.'"

APPENDIX B

The Court below *expressly* rejected as either erroneous or irrelevant the following, which are asserted to be "findings of fact" in the Brief of the Solicitor General at the pages indicated:

p. 4 "As of January and February 1960, the time of the Board hearing herein the Company had not supplied the . . . seniority roster requested in 1958."

p. 4 "A copy of the unilaterally instituted insurance policy was furnished the Union on June 4, 1959, after the Union in bargaining sessions in April and again on June 4 had demanded increased benefits thereunder."

p. 4 "On March 2, 1959, the Union submitted its contract proposal wherein it sought, among other things, increased wages, liberalized vacation benefits, and the institution of paid holidays."

p. 5 "Unlike the expiring agreement, this proposed contract omitted the checkoff of union dues; leaves of absence for union business; the right of the parties, upon mutual consent, to amend the contract; the requirement of notice to the Union of proposed workload changes; the right of the Union to reopen wages; the provision barring discrimination against the Union or its members; and the provision for processing of pending grievances past contract termination. In addition, the Company proposed to lengthen the grievance procedure, remove workload disputes from the regular arbitration procedure, and limit the material to be presented at arbitration hearings. Further, the Company contract proposal would have subjected the Union to civil suits for unauthorized work stoppages; vested the employer with power to determine employee compensation and classification for job retention or layoff;

and, by specifying that all jobs remain temporary until designated permanent by the Company, gave the Company the right to abolish jobs without negotiation and in disregard of earned seniority." [The Petitioner showed all of these interpretations of its counterproposal to be unwarranted and the Court, instead of adopting any of them, found, contrary to the Board, that the counterproposal was not "predictably unacceptable," and that, if either proposal was, it was the Union's. (Pet. 20a.)]

p. 6 "On April 6, although it had not yet presented to the Union a specific wage proposal, the Company posted a notice on the plant bulletin board. It advised the employees that a wage increase would be paid April 27 and expressed the hope that the Union would agree so that there would be no delay of the increase beyond that date."

p. 7 "That afternoon the Company . . . revealed that within the preceding 60 days it had unilaterally changed the duties and wages of the forklift driver."

p. 8 "On April 13, the Company posted a detailed wage schedule on the plant bulletin board. The notice . . . stated that the posted wage scale, which was intended to be put into effect April 27, had been presented to the Union on April 10, and that the Company hoped the Union would agree and not delay the increase."

p. 12 "In June, while the strike was on and negotiations were still underway, . . . the Company unilaterally changed the wages and workloads of loomfixers."